IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0172

MONTANA DEMOCRATIC PARTY and MITCH BOHN, WESTERN NATIVE VOICE et al., MONTANA YOUTH ACTION, et al.,

Plaintiffs and Appellees,

v.

CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State,

Defendant and Appellant.

RESPONSE BRIEF OF APPELLEES WESTERN NATIVE VOICE, MONTANA NATIVE VOTE, BLACKFEET NATION, CONFEDERATED SALISH AND KOOTENAI TRIBES, FORT BELKNAP INDIAN COMMUNITY AND NORTHERN CHEYENNE TRIBE

On Appeal from the Montana Thirteenth Judicial District Yellowstone County
Cause No. DV-21-0451
Honorable Judge Michael G. Moses

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(1) Whether the constitutional right to vote is treated differently than other fundamental rights and subjected to a reduced level of scrutiny.

(2) Whether the district court abused its discretion by enjoining House Bill 176.

STATEMENT OF THE CASE

On May 17, 2021, Appellees Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe ("WNV Appellees") filed a complaint in Yellowstone County District Court alleging that the House Bill 176 ("HB 176") and House Bill 530 ("HB 530") violate their fundamental rights under the Montana Constitution, including the right to vote, equal protection, freedom of speech, and due process. HB 176 ends the 15-year practice of late voter registration on Election Day ("Election Day Registration," or "EDR") in the State of Montana by revising §§ 13-2-301, 13-2-304, 13-13-301, 13-19-207, and 13-21-104, MCA. HB 530 places new restrictions on the collection or conveyance of absentee ballots that inhibits the practice. WNV Appellees challenged these provisions three days after HB 530 was signed into law and twenty-nine days after HB 176 was signed into law.[1] This appeal concerns HB 176, the repeal of EDR.

[1] WNV Appellees' case was consolidated with pending 13th Judicial District Court actions brought by the Montana Democratic Party and Mitch Bohn ("MDP") and Montana Youth Action *et al*. ("MYA").

On January 12, 2022, after Appellant's motion to dismiss the MDP case, her opposition to consolidation, and varied and numerous issues with Appellant's discovery responses delaying receipt of information necessary to complete the preliminary injunction filing, WNV Appellees moved for a preliminary injunction enjoining enforcement of HB 176 and HB 530 in advance of the 2022 primary and general elections. On April 6, 2022, the District Court issued an order granting the motion, preliminarily enjoining both HB 176 and HB 530. WNV-A1-59. In a fifty-eight-page order, the District Court concluded that Appellees were likely to succeed on the merits of their claims because they made a prima facie showing that HB 176 and HB 530 unconstitutionally burden Appellees' rights to vote, equal protection, free speech, and due process.[2] *Id*. The District Court also concluded that Appellees would suffer irreparable harm if the laws were to remain in effect. *Id*.

Appellant filed a motion to suspend the preliminary injunction of HB 176 pending appeal, and a notice of appeal as to HB 176.[3] Appellant did not move to stay or appeal the injunction as to HB 530. The District Court denied Appellant's motion to stay the injunction on April 22, 2022. On April 27, 2022, Appellant

[2] The Court also enjoined Senate Bill 169 and House Bill 506, which were challenged by MDP and MYA, but not by the WNV Appellees.
[3] Appellant also appealed the Court's Order enjoining SB 169. Since the WNV Appellees did not challenge SB 169, this brief only addresses Appellant's appeal of HB 176.

appealed the motion to stay to this Court. This Court granted Appellant's motion to stay on May 17, 2022.

STATEMENT OF FACTS

EDR, enacted in 2005 through a bipartisan bill, enables voters to register or change their registration to vote and submit their ballot on Election Day. WNV-A8. The citizens of Montana overwhelmingly affirmed their support for EDR in 2014 when they rejected Ballot Measure LR 126, which would have ended EDR statewide. EDR has had a long and successful history in Montana up until its elimination by HB 176. 12,055 individuals used EDR in 2016, and over 8,000 individuals did in both 2018 and 2020. WNV-A9; WNV-A112. According to the Secretary of State and Chief of Elections Officer at the time EDR was established, "[v]irtually everyone supported [EDR because] election day registration is the ultimate failsafe."[4]

Native American voters in Montana will be impacted disproportionately by HB 176. Native Americans living on reservations "are more reliant on EDR" and use it at a consistently higher rate than other Montanans. WNV-A11; WNV-A248; WNV-A266; WNV-A302. Native American voters face numerous barriers to the franchise including poverty, worse educational and health outcomes, less stable

[4] Lisa Baumann, *Ending Election Day registration sees little support,* Great Falls Tribune, (Oct. 19, 2014, 4:17 PM), https://www.greatfallstribune.com/story/news/local/2014/10/19/ending-election-day-registration-sees-little-support/17583087/.

housing and higher homelessness rates, lack of internet or residential mail services, and inadequate transportation—all of which makes registration and voting more difficult for them and thus makes access to EDR particularly important. *See, e.g.*, WNV-A80–84, 96–102, 117–18, 127–32. In the past, EDR has been available at a satellite location on the Blackfeet reservation. WNV-A265-66; WNV-A312. Other Native voters living on reservations do not have EDR opportunities offered at their satellite locations; they must instead visit the county seat to register or change their registration and vote on Election Day. WNV-A298–99; WNV-A647. Native Americans in Montana also must travel farther to register at their county seats than non-Natives and have less access to working vehicles and money for gas and car insurance. WNV-A11; WNV-A321–22, 326, 344; WNV-A81, 107, 118. Most county seats are located outside reservations. County seats are also often located in reservation "border-towns" where Native Americans often encounter racial hostility and discrimination. WNV-A453–70; WNV-A604; WNV-A100, 174–78; *see also* WNV-A314. All these challenges particular to registration and voting on-reservation in Montana make it important for tribes and supporting organizations to have a registration failsafe. Because of the distances, tribes and Organizational Appellees must concentrate resources in ensuring that their members and constituents can register and vote on the same day, and they have come to rely on EDR in their civic engagement work. *See* WNV-A474 (describing

the effort that goes into organizing and facilitating registration and voting on Election Day). EDR ensures that the most voters can exercise their right to vote, as interest and awareness peaks on Election Day, WNV-A615, 619, 622–23, and it is when many eligible Native voters learn that they may not be properly registered, WNV-A404.

Western Native Voice ("WNV") and Montana Native Vote, whose get-out-the-vote work plays a critical role in increasing voter turnout in Montana, will be negatively impacted by the elimination of EDR. On Election Day, the most popular day for civic engagement, these organizations transport unregistered Native voters and Native voters with errors in their registrations to county seats to register. Their operations have already been negatively impacted by HB 176, which will further require them to "spend additional resources to hire organizers earlier in the election cycle to mobilize turnout." WNV-A25; WNV-A604–05; WNV-A302.

Without EDR, members of Tribal Appellees have diminished opportunities to vote and advocate on behalf of their members. WNV-A314; WNV-A647. Members of the Blackfeet Nation especially rely upon EDR on the Blackfeet Reservation, where there is generally a satellite location allowing for registration and voting on Election Day. WNV-A248; WNV-A265–68; WNV-A313. Members of the Blackfeet Nation have higher housing instability, requiring

updated registration. WNV-A312. They have fewer opportunities to register during the year. WNV-A313. When registration is only available at the county seat, some Blackfeet tribal members must travel over 120 miles to register at the county seat. WNV-A313; WNV-A343.

As the District Court found, "tribal members are more reliant on EDR" than other Montanans. WNV-A11. The Legislature was well aware of this reliance when HB 176 was passed. In legislative hearings, the vast majority of witnesses vociferously opposed the bill, outlining the specific dangers to electoral participation caused by repealing EDR and particularly highlighting the disproportionate harms to Native American voters. WNV-A10; WNV-A405; WNV-A471–98, WNV-A499–514. WNV political director Keaton Sunchild explained why EDR is critical to Montana's Native American voters, including having to overcome long distances to travel and the tradition of voting in person on Election Day. WNV-A405; WNV-A488–89. WNV organizer Lauri Kindness described how her team had assisted 150 voters with registering on Election Day and that ending EDR would add another barrier to a system that already disenfranchises Native voters. WNV-A481. Elections Administrator Regina Plettenberg testified that EDR's repeal would result in fewer people being able to vote. WNV-A485. Other opponents of HB 176 testified that EDR is a failsafe for

voters who show up to vote on Election Day only to discover that an administrative error has caused them to not be registered. WNV-A405; WNV-A512–13.

Secretary Jacobsen and her staff spoke in favor of HB 176 and referenced voter integrity and mitigating fraud as rationales for its adoption. WNV-A12. She did not identify a single instance of fraud committed by a Montana voter, much less one connected to EDR. WNV-A151. When pressed by a legislator for examples of fraud that would be prevented by ending EDR, bill sponsor Representative Sharon Greef had no response. WNV-A495; WNV-A509. Representative Greef also clarified that she "wasn't talking about Montana specifically" when she referenced voter fraud as a justification for HB 176. WNV-A9–10. In Montana, out of millions of votes cast, only one or two people have ever been convicted of voter fraud, and no convictions have been related to EDR. WNV-A141. In *Driscoll v. Stapleton*, former Secretary of State Corey Stapleton "did not present evidence in the preliminary injunction proceedings of voter fraud . . . occurring in Montana." WNV-A19 (citing 2020 MT 247, ¶ 22, 401 Mont. 405, 416, 473 P.3d 386, 393). Montana's 2020 post-election audit also revealed no instances of fraud. WNV-A141.

Without any evidence of voter fraud justifying HB 176, the Secretary has now leaned into the argument that eliminating EDR will improve administrative efficiency, claiming that moving the registration deadline back one day would

reduce lines at the polls and administrative burden for election officials. WNV-A12. However, the legislative record for HB 176 included no evidence of long lines at the polls or that eliminating EDR would reduce those lines. WNV-A150–51. In fact, EDR only occurs in one centralized location and not at the vast majority of polling places. WNV-A624; WNV-A701; *see* Mont. Admin. R. 44.3.2015(1)(b)(iv).

STANDARD OF REVIEW

"[D]istrict courts are afforded a high degree of discretion to grant or deny preliminary injunctions." *Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 7, 400 Mont. 1, 5, 462 P.3d 218, 221. A district court's grant of a preliminary injunction is reviewed "for a manifest abuse of discretion," which is defined as "one that is 'obvious, evident, or unmistakable.'" *Driscoll*, ¶ 12 (quoting *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 355, 440 P.3d 4, 8).

"[A] party need establish only a prima facie violation of its rights to be entitled to a preliminary injunction—even if such evidence ultimately may not be sufficient to prevail at trial." *Id.*, ¶ 16 (internal citations omitted). Under Montana law, "'[p]rima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Weems*, ¶ 18 (internal citation omitted).

Appellant's argument that a higher standard of review is warranted because the District Court entered a mandatory injunction is without merit. "A mandatory injunction orders a responsible party to take action, while a prohibitory injunction prohibits a party from taking action." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014) (internal citations and alterations omitted). Appellant claims that the District Court's injunction is a mandatory injunction "[b]ecause it requires election officials to take a positive action." Def's Br. 16 (internal quotation marks omitted). Yet Appellant never explains what this positive action is, nor does she make clear that she as the responsible party would be undertaking it, as opposed to other elections officials. As the District Court correctly found, its injunction is prohibitory because its sole function is to prevent enforcement of HB 176. WNV-A5.

Regardless, Appellant does not explain how the legal standard for establishing a mandatory injunction is different than that for a prohibitory injunction. To the contrary, this Court has previously said it was aware of "no authorities . . . to show Montana has differentiated the standard of review for mandatory injunctions from that for any other injunction." *City of Whitefish v. Troy Town Pump, Inc.*, 2001 MT 58, ¶ 21, 304 Mont. 346, 352, 21 P.3d 1026, 1029. As such, there is no reason to believe the standards for mandatory and

prohibitory injunctions differ from each other. *See id.* Thus, this Court should use the prevailing standard when reviewing the District Court's preliminary injunction.

SUMMARY OF ARGUMENT

In its review of the uncontested and detailed factual record, the District Court did not manifestly abuse its discretion when it found that HB 176 constituted a disproportionate and severe burden on the voting rights of Native Americans in Montana. Appellees made a prima facie showing that HB 176's elimination of EDR—an option disproportionately relied upon by Native American voters in Montana since its establishment over 15 years ago—violates their fundamental right to vote and to equal protection of the laws under the Montana Constitution. The District Court's review of HB 176 is consistent with this Court's precedent that restrictions on fundamental rights, and specifically the right to vote, are subject to strict scrutiny. Appellant repeatedly ignores this Court's precedent, instead trying to invoke the more flexible federal standard that has never been adopted in Montana.

The District Court found, and the uncontroverted record demonstrates, that (1) EDR is widespread in Montana; (2) Native Americans face disproportionate voter costs due to socioeconomic and logistical disparities; and (3) in part due to the higher voter costs they face, Native voters disproportionately rely on EDR and thus will be burdened disproportionately by its elimination. This record is

remarkably similar to the one this Court had before it just two years ago in *Driscoll*, and the District Court's constitutional analysis closely tracks this Court's analysis from that case.

Appellant cannot immunize HB 176 from constitutional challenge by invoking the Legislature's discretion to regulate elections, as the Legislature must still exercise its authority within constitutional limits. And Appellant's reliance on speculative, unsubstantiated, and post-hoc rationales of administrative efficiency and voter integrity demonstrates that HB 176 cannot satisfy any legal standard.

Under the highly deferential standard for review of a preliminary injunction, the District Court did not manifestly abuse its discretion by enjoining HB 176.

ARGUMENT

I. The District Court Did Not Abuse its Discretion in Determining Appellees Are Likely to Succeed on the Merits of Their Claims

A. The Right to Vote is Fundamental Under the Montana Constitution and the District Court Correctly Applied Strict Scrutiny.

This Court has repeatedly held that "strict scrutiny [is] used when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights." *Driscoll*, ¶ 18; *see also Mont. Cannabis Indus. Ass'n v. State* ("*MCIA*"), 2012 MT 201, ¶ 16, 366 Mont. 224, 229, 286 P.3d 1161, 1165; *Wadsworth v. State* (1996), 275 Mont. 287, 302, 911 P.2d 1165, 1174. As even the Secretary acknowledges, Def's Br. 19, the right to vote "is a fundamental right because it is

guaranteed by the Declaration of Rights," *Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 225, 988 P.2d 1236, 1246; *see also State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 206, 113 P.3d 281, 288. The State provides no binding authority supporting its argument that the right to vote should be treated differently than other constitutionally enumerated rights. Rather, Appellant urges the Court to rely instead on federal cases: *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), to adopt the flexible federal "balancing test," known as *Anderson-Burdick*.

Yet this Court has long applied strict scrutiny to right-to-vote challenges, including those cases decided after federal courts adopted *Anderson-Burdick*. *See Johnson v. Killingsworth* (1995), 271 Mont. 1, 894 P.2d 272; *Finke v. State ex rel. McGrath*, 2003 MT 48, 314 Mont. 314, 65 P.3d 576. Indeed, under this Court's precedent, strict scrutiny applies to "any statute or rule which *implicates* [a fundamental right] … and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *Mont. Env't Info. Ctr.*, ¶ 63 (emphasis added). Far from being "unprecedented," Def's Br. 10, the District Court's analysis was compelled by this Court's precedent. To agree with Appellant and adopt *Anderson-Burdick* would require this Court to expressly overrule these precedents.

"In interpreting the Montana Constitution, this Court has repeatedly refused to 'march lock-step' with the United States Supreme Court, even where the state constitutional provision at issue is nearly identical to its federal counterpart." *State v. Guillaume*, 1999 MT 29, ¶ 15, 293 Mont. 224, 230, 975 P.2d 312, 316. This Court has never been afraid to "walk alone" in terms of its divergence from federal constitutional interpretation. *State v. Long* (1985), 216 Mont. 65, 69, 700 P.2d 153, 156. This is in part because this Court has recognized that "the rights and guarantees afforded by the United States Constitution are minimal, and that states may interpret provisions of their own constitutions to afford greater protection than the United States Constitution." *Guillaume*, ¶ 15. As it has so many times in the past, this Court should reject the invitation to subject constitutional rights to a relaxed federal standard. *See City of Missoula v. Duane*, 2015 MT 232, ¶ 16, 380 Mont. 290, 294, 355 P.3d 729, 732 (collecting cases).

And in fact, Montana would not be "walking alone" in applying strict scrutiny, rather than *Anderson-Burdick*, to laws that implicate the right to vote. Many states around the country apply strict scrutiny to laws that implicate or burden their respective states' constitutional right to vote. In *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000), the Idaho Supreme Court rejected *Anderson-Burdick* and held that "[b]ecause the right of suffrage is a fundamental right, strict scrutiny applies." The Court distinguished *Anderson-*

Burdick because "*Burdick* did not deal with the Idaho Constitution and instead was decided under the United States Constitution." *Id.* The supreme courts in other states—including Illinois, North Carolina, Washington, and Kansas—have done likewise. *See Tully v. Edgar*, 664 N.E.2d 43, 47 (Ill. 1996) ("Where challenged legislation implicates a fundamental constitutional right, however, such as the right to vote, the presumption of constitutionality is lessened and . . . the court will examine the statute under the strict scrutiny standard."); *see also Harper v. Hall*, 868 S.E.2d 499, 54 (N.C. 2022); *Madison v. State*, 163 P.3d 757, 767 (Wash. 2007); *Moore v. Shanahan*, 207 Kan. 645, 649 (1971).

Despite clear and consistent precedent from this Court, Appellant instead claims that this Court engages in a balancing inquiry when it comes to some fundamental rights. Yet in all the cases Appellant cites for this proposition, this Court applied lower scrutiny *only* because the challenged laws in question did not implicate a fundamental right, *not* because lower scrutiny should apply to laws that actually do implicate those fundamental rights. *See MCIA*, ¶ 24 ("Because the fundamental right to seek one's own health is not implicated, the District Court erred when it applied a strict scrutiny analysis."); *id.* ¶ 21 ("the MMA does not implicate the fundamental right to employment"); *Willems v. State*, 2014 MT 82, ¶ 34, 374 Mont. 343, 352, 325 P.3d 1204, 1210 (upholding District Court's determination that plaintiffs' right-to-vote claim was "without merit" in large part

because the "purported violation of the right of suffrage would not be cured at all" if plaintiffs prevailed). In *Nelson v. City of Billings*, the right at issue—the right to know—explicitly did not apply "in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." 2018 MT 36, ¶ 12, 390 Mont. 290, 294, 412 P.3d 1058, 1063. As such, this Court merely determined that attorney-client privilege fell into that exception, *not* that the right-to-know itself was insufficiently strong to apply. *Id.* ¶ 22. The rule is clear: where fundamental rights are implicated—with very narrow exceptions not applicable here—strict scrutiny applies.

Appellant also argues that Article IV, § 3 gives the Legislature sufficient discretion to repeal EDR. *See* Def's Br. 20. However, the State's authority to regulate elections must be exercised "within constitutional limits." *Larson v. State*, 2019 MT 28, ¶ 21, 394 Mont. 167, 184, 434 P.3d 241, 253; *see also Wheat v. Brown*, 2004 MT 33, ¶ 27, 320 Mont. 15, 22, 85 P.3d 765, 770 ("[T]he ("the people, through the legislature, have plenary power, except in so far as inhibited by the Constitution") (internal quotation marks and citations omitted); *State v. Savaria* (1997), 284 Mont. 216, 223, 945 P.2d 24, 29 (finding the Legislature may only exercise whatever discretion it has "subject . . . to constitutional limitations."). To the extent the Legislature has discretion related to voter registration, it must

exercise that discretion in a way that comports with the fundamental right to vote guaranteed in the state constitution.

Further, the same constitutional provision Appellant cites here also gives the Legislature the right to regulate absentee ballots, *see* Mont. Const. art. IV, § 3; yet this Court in *Driscoll* found that the State could not exercise this right in a way that infringes on the constitutional right to vote, *Driscoll*, ¶ 23 (holding that the State's regulation of absentee ballot collection "may unconstitutionally burden the right of suffrage, particularly with respect to Native American[s] . . ."). Under the Secretary's reading, the Legislature had the same discretion to pass the Ballot Interference Prevention Act ("BIPA") as it did HB 176. Yet in *Driscoll*, this Court upheld the preliminary injunction enjoining BIPA on virtually identical grounds as Appellees seek here—declining to "set forth a new level of scrutiny" for right-to-vote claims, assessing the law's burden on Native American voters, and then assessing the State's interest in the law. *Id.* ¶ 20.

Appellant finally argues that if this Court applies the same legal standard it has applied for decades, it would mean that "there is a right to vote in any manner, free from regulation." Def's Br. 18. This is not at all true. Subjecting HB 176, or indeed any statute, to strict scrutiny does not automatically mean that it does not pass constitutional muster, just that it must be narrowly tailored to achieve a compelling governmental interest. Appellant has the opportunity to present facts

and testimony demonstrating that HB 176 satisfies this standard at the upcoming trial scheduled in this case.

The right to vote is foundational. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Larson*, ¶ 81 (McKinnon, J., dissenting) (citations omitted). The Secretary's suggestion that this Court break from precedent and offer lesser protections for this fundamental right is deeply dangerous to our democracy.

B. Even if this Court Adopted the Federal Test, the Preliminary Injunction Was Correctly Issued.

Though HB 176 should be evaluated under a strict scrutiny standard, even under *Anderson-Burdick*, the District Court properly enjoined the statute. The federal test still "requires strict scrutiny" when "the burden imposed [by the law] is severe." *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018). Given that HB 176 constitutes a severe burden on Appellees' constitutional right to vote, *see infra*, the constitutional analysis under *Anderson-Burdick* is identical to the analysis under strict scrutiny.

When applying the *Anderson-Burdick* balancing test to a state election law, courts "must weigh 'the character and magnitude of the asserted injury'" to the plaintiff's constitutional rights "against 'the precise interests put forward by the

State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Under this test, a court's "inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens" the plaintiff's rights. *Id.*

When assessing the severity of the burden on plaintiffs' right to vote under *Anderson-Burdick*, "courts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 n.2 (9th Cir. 2016) (en banc). In fact, it is imperative that courts look at the effect on Appellees and the people they represent because the right to vote is "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964); *see also Veasey v. Abbott,* 830 F.3d 216, 249 n.40 (5th Cir. 2016) (en banc) ("The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily.") (citations omitted). The touchstone of the burden analysis, then, is how significantly the restriction threatens the right to vote for those voters who are harmed.

"Plaintiffs [do] not need to show that they were legally prohibited from voting, but only that 'burdened voters have few alternate means of access to the ballot.'" *Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (internal

quotation marks omitted). Appellees meet this standard. The fact that HB 176 is a facially neutral change to the law governing EDR does not mean that it does not affect WNV Appellees' right to vote. In fact, there has been a long history of using "race-neutral devices . . . to deprive [minority] voters of the franchise." *Shaw v. Reno*, 509 U.S. 630, 639 (1993); *see also Lane v. Wilson*, 307 U.S. 268, 275 (1939) (discussing how "onerous procedural requirements . . . effectively handicap exercise of the franchise by [minority voters] although the abstract right to vote may remain unrestricted as to race."). Here, as found by the District Court, the evidence presented established a prima facie case that the repeal of EDR severely infringed on the right to vote of Native American voters. Given the infringement on Appellees' right to vote, even under the federal test, HB 176 would not pass constitutional muster.

C. The Uncontested, Detailed Factual Record Shows That HB 176 Imposes a Severe Burden on Appellees' Right to Vote.

The uncontested factual record in this case demonstrates that HB 176 constitutes a disproportionate and severe burden on the voting rights of Native Americans in Montana. As she has throughout this entire litigation, Appellant ignores the factual record entirely, including the District Court's factual findings, which are reviewed for manifest abuse of discretion. Appellant cannot simply wish away the overwhelming factual record detailing how HB 176 severely burdens the fundamental right to vote for Appellees and their members.

Regarding HB 176's burdens, the District Court made three main types of factual findings: (1) EDR is widespread in Montana; (2) Native Americans face disproportionate voter costs due to socioeconomic and logistical disparities; and (3) in part due to the higher voter costs they face, Native voters disproportionately rely on EDR and thus will be burdened disproportionately by its elimination.

First, the record is clear that EDR in Montana increases turnout significantly by reducing voter costs and making it easier to vote. Since EDR went into effect in 2006, more than "70,000 Montanans registered to vote on election day"; as of April 2021, more than 7% of all registered voters in Montana had used EDR at least once since 2008. WNV-A660. EDR's popularity has grown over time. WNV-A668-69, 671. And contrary to Appellant's claim to the contrary, Def's Br. 7, the overwhelming consensus in the empirical political science literature that "EDR tends to increase turnout, and, correspondingly, that eliminating EDR is likely to reduce turnout . . . [is] among the more consistent in the political science literature on voting," WNV-A618; *see also* WNV-A109-10 ("The evidence on whether EDR augments the electorate is remarkably clear and consistent. Studies finding positive and significant turnout impacts are too numerous to list.") (internal quotation marks omitted). Indeed, EDR has boosted turnout levels in Montana and has "an effect greater [on turnout] than *any other* change in voting procedures." WNV-A667 (emphasis added). And as discussed *infra*, the District Court found

that the repeal of EDR has already disenfranchised voters in the 2021 elections. WNV-A10-11.

Second, the District Court made findings as to the disproportionate voter costs facing Native Americans in Montana. The District Court found that "Native Americans have further to travel to register to vote, have less access to vehicles, [and] have less access to money for gas and car insurance." WNV-A45; *see also* WNV-A45 (noting Native Americans also have "less access to internet" compared to the general population, in addition to other "structural barriers to casting a ballot"). The District Court also determined that "there is a higher poverty and unemployment rate on-reservations than for the State and that Native Americans have less money in their pocket" than the general population. WNV-A14-15 (internal quotation marks omitted).

Appellees' unrebutted expert testimony reveals other socioeconomic disparities—the result of centuries of discrimination against Native Americans—that make it more difficult for Native Americans living on reservations to register and vote. Native Americans in Montana are less likely to own a home and much likelier to be homeless or insecurely housed, making it difficult for them to have the political stability necessary to maintain voter registration and participate politically. WNV-A94-97. Native Americans in Montana have worse educational outcomes—including much lower high school and college graduation rates—than

the rest of the state. WNV-A91-94. Educational outcomes are both an important predictor of political participation and a gateway to economic opportunity and employment. WNV-A91-94. Native Americans are also overrepresented in the criminal justice system and targeted by law enforcement, while also disproportionately the victims of crime. WNV-A102-06. These socioeconomic burdens, taken together, make EDR crucial for Native American voters because they are likelier to have "to travel long distances, have limited transportation options, do not have reliable internet, and have an income level that inhibits multiple trips to a distant location." WNV-A111. The factual record shows the critical importance of Election Day itself as the point of access for tribes and supporting organizations to organize their resources to allow the greatest number of Native voters to be able to exercise their right to vote. *See* WNV-A615, 619, 622-23; WNV-A605; WNV-A313; WNV-A647; WNV-A303-04.

The factual record here is remarkably similar to the one this Court reviewed in *Driscoll*, when it found that "Native American voters as a group face significant barriers to voting"—including that "many live far away from county elections offices . . . ; many have limited access to transportation . . . and many experience higher rates of poverty." *Driscoll*,, ¶ 6. The District Court made precisely these same findings here, unchallenged by Appellant. And as this Court found less than two years ago, this "evidence of various [socioeconomic] factors contributing to

unequal access to the polls for Native American voters would be exacerbated by [the challenged law], burdening this subgroup's constitutional right to vote." *Id.* ¶ 21.

Third, the District Court, again relying upon unrebutted expert testimony, found that "the percentage of voters using [EDR] is consistently higher for people living on-reservation in Montana." WNV-A11; *see also id.* (finding that "tribal members are more reliant on EDR" than the general population) (internal quotation marks omitted). Thus, HB 176 disproportionately burdens Native Americans for two reasons: (1) socioeconomic and logistical disparities make voting harder for Native Americans in Montana, and (2) Native Americans are more reliant on EDR than other Montanans.

Appellees have "presented [uncontested] evidence to demonstrate that the importance of [EDR] is more significant for Native American voters than for any other group," *Driscoll*, ¶ 6, and that as a result, repealing EDR places an unconstitutional "disproportionate burden to Native American voters' . . . 'right of suffrage,'" *id.* ¶ 23 (internal citations omitted). Similar to this Court's analysis in *Driscoll*, the District Court properly found that "HB 176 eliminates an important voting option for Native Americans and will make it harder, if not impossible, for some Montanans to vote." WNV-A39; *see also* WNV-A248 ("[L]imiting EDR will have a disproportionate negative effect on Native voters."); WNV-A121

(concluding the "loss [of EDR] will be most severely felt by Native voters living on distant reservations."). And just as this Court found crucial in *Driscoll*, "the Secretary has pointed to no evidence in the preliminary injunction record that would rebut . . . a disproportionate impact on Native American voters." *Driscoll*, ¶ 22.

Appellant simply ignores this mountain of unrebutted evidence, choosing instead to focus on courts in other states that have upheld certain registration deadlines. These cases are distinguishable, and this line of argument is unavailing, for several reasons. Most fundamentally, these are non-binding, out-of-state decisions in which courts have interpreted state laws that have nothing to do with the Montana Constitution, and have applied a lower standard of scrutiny to restrictions on voting. For example, Appellant cites a Massachusetts case, without acknowledging that the legal standard for evaluating state constitutional right to vote claims is less stringent under Massachusetts law than it is under Montana law. *Compare Doe v. Sec'y of Educ.*, 479 Mass. 375, 392 (2018) (finding strict scrutiny applies "*only* [to] a statute that *significantly interferes* with the fundamental right at issue") (internal quotation marks and alterations omitted) (emphasis added), *with Driscoll*, ¶ 18 ("strict scrutiny [is] used when a statute *implicates* a fundamental right found in the Montana Constitution's declaration of rights.") (internal citations omitted and emphasis added). The cases from other states Appellant cites similarly

applied a less exacting level of scrutiny than is required under Montana law.[5] They are simply inapposite.

Appellant's out-of-state cases are further distinguishable for another reason: all of them concerned whether a state that has *never before* offered EDR has an affirmative obligation to provide EDR. None involved the question presented here—namely, whether under Montana's Constitution, the state may, without constitutional constraints, *eliminate* a method of registration and voting that a significant number of voters have come to rely upon over the past 15 years.

That distinction matters for two reasons. First, as a factual matter, eliminating voting opportunities on which voters have come to rely in significant numbers is particularly burdensome. The record in this case demonstrates not simply that EDR is beneficial to voter turnout generally—although it is—but that thousands of Montana voters have relied on EDR in recent elections, WNV-A9; WNV-A112, that voting is habitual, WNV-A257-59, and that, as noted *supra*, Organizational Appellees have built their civic engagement efforts for Native American voters to a significant degree in reliance on the availability of EDR to overcome the significant barriers to participation those voters face. It is irrelevant whether EDR may benefit other jurisdictions without Montana's particular history

[5] *See Rutgers Univ. Student Assembly v. Middlesex Cnty. Bd. of Elec.*, 446 N.J. Super. 221, 234-35 (2016);); *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1329-30 (S.D. Fla. 2008);); *ACORN v. Bysiewicz,* 413 F. Supp. 2d 119, 149 (D. Conn. 2005).2005).

and demographics; its *elimination* in Montana, where there has been heavy reliance on it by historically disenfranchised voters, will significantly burden the fundamental right to vote.

Second, as a legal matter, once the state decides to offer a voting opportunity, the elimination of that voting opportunity is subject to constitutional limitations. This principle is well established under both Montana Supreme Court and United States Supreme Court precedents. *See Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 261, 109 P.3d 219, 222 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)); *Harper v. Va. State Bd. of Elec.*, 383 U.S. 663, 665 (1966) (finding that while "the right to vote in state elections is nowhere expressly mentioned . . . once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants." (internal citations omitted)). None of the out-of-state cases Appellant cites involved the *repeal* of a voting opportunity, as presented here.

The only out-of-state case factually analogous to this litigation is the one Appellant failed to cite: when the U.S. Court of Appeals for the Fourth Circuit enjoined the *elimination* of same-day registration in North Carolina largely on grounds "that Plaintiffs presented unrebutted testimony that African American North Carolinians have used same-day registration at a higher rate than whites in the three federal elections during which same-day registration was offered and recognized that the *elimination* of same-day registration would bear more heavily on African-Americans than whites." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014) (internal quotation marks and alterations omitted) (emphasis added). And there, the Fourth Circuit explicitly faulted the district court for "refusing to consider the *elimination* of voting mechanisms successful in fostering minority participation," and ordered the state to restore same-day registration. *Id.* at 242 (emphasis added).

This Court should not reward Appellant's attempt to obfuscate the record with appeals to inapposite out-of-state cases. The factual record, and the legal standard as set out in the Montana Constitution and this Court's precedent, makes clear that HB 176's elimination of EDR imposes a severe and disproportionate burden on Appellees' and their members' fundamental right to vote. Thus, even under *Anderson-Burdick*, heightened scrutiny should apply because the burden on the right to vote is severe.

D. Appellant Cannot Justify HB 176 Under Any Legal Standard.

Even if Appellant is correct and *Anderson-Burdick* applies, and this Court determines that the burden on Appellees' right to vote is less than severe, HB 176 still cannot pass constitutional muster because Appellant has failed to "present evidence" supporting her alleged interests. *Driscoll*, ¶ 22. "[S]peculative concern[s]" are not sufficient "*as a matter of law* to justify *any* regulation that burdens a plaintiff's right, especially where that burden is more than de minimis." *Soltysik v. Padilla*, 910 F.3d 438, 448 (9th Cir. 2018) (internal citation omitted). Appellant's failure to proffer evidence in support of the state's interest dooms her opposition to the District Court's injunction.

Appellant appears to be under the misapprehension that, if HB 176 constitutes a burden that is less than severe, rational-basis review applies. *See* Def's Br. 43. Yet, even for less than severe burdens, *Anderson-Burdick* is not a "rational basis test" but rather a "means-end fit framework" that requires more than speculative state concern. *Soltysik*, 910 F.3d at 449; *Pub. Integrity All.,* 836 F.3d at 1025 (rejecting the notion that *Anderson-Burdick* calls for "rational basis review"); *see also Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 599 (6th Cir. 2012) (finding the state's "vague public interest concerns" cannot outweigh the harm to plaintiffs).

Appellant has failed to proffer any evidence in support of the State's purported interests. First, Appellant states that HB 176 supports the State's interest "in ensuring an orderly, accurate, and efficient election that increases public confidence in elections." Def's Br. 43. Here, Appellant focuses principally on a purported "increased burden on election staff caused by having to process new voter registrations at the same time they are processing and counting votes." *Id.* In weighing the evidence presented by Appellant, however, the District Court found that "EDR is not a significant burden" on election administrators and that, to the extent it is, HB 176 simply "moves the burden" by a day rather than eliminating it. WNV-A47. The record supports the District Court's conclusion. Audrey McCue, then-Elections Department Supervisor in Lewis and Clark County, testified against HB 176 by stating that ending EDR was "not . . . helpful administratively," "will not help" in her job administering elections, and "is certainly more work" than administering elections with EDR. WNV-A405; WNV-A502. Eric Semerad, the Gallatin County Clerk and Recorder, testified that EDR was "not causing additional burden" in his county, and that it was a "mistake" to repeal EDR because it will disenfranchise voters. WNV-A701-02. Similarly, Bradley Seaman, Missoula County Elections Administrator, testified that his staff was "prepared to accommodate Election Day registration" and that EDR "has been an important

facet of Montana law that has acted as a failsafe for many voters to cast their vote." WNV-A707-08.

Even if HB 176 reduced these purported administrative burdens on election administrators, it is not tailored to meet this goal because there are myriad ways to reduce Election Day burdens on election administrators—including providing counties more resources, hiring more poll workers, modernizing voting machines, or expanding early voting—that would not harm Native American voters. Under the federal balancing test, even in "instances where a burden is not severe enough to warrant strict scrutiny review [it can be] serious enough to require an assessment of whether alternative methods would advance the proffered governmental interests." *Soltysik*, 910 F.3d at 448.

Second, Appellant's assertions that HB 176 would make elections more accurate or timely reported, and increase public confidence in elections, are entirely unfounded. Multiple election administrators have testified that EDR helps ameliorate errors that occur in the registration process before Election Day and allows election administrators to correct any registration mistakes on Election Day. WNV-A701-02; WNV-A707. Nothing in the record suggests that repealing EDR would make elections any more accurate, nor does Appellant point to a single instance where an election administrator was unable to report election results in a timely fashion due to EDR. And all data and scholarship in the record show that

voter confidence in Montana is high, remarkably stable, and driven by factors that have nothing to do with HB 176. WNV-A629-34.

Third, Appellant claims that "EDR cause[s] long lines at polls" for Native American voters and that HB 176 can reduce those lines and ease the burden on those voters. Def's Br. 44. Yet, EDR occurs only at centrally designated locations, which in almost all cases are county election offices. As such, any purported increase in wait times will have no effect on the vast majority of in-person voters, who vote at precinct-based polling locations. *See* Mont. Admin. R. 44.3.2015(1)(b)(iv); WNV-A701; WNV-A624; WNV-A719. As for potential lines at the county seat, Appellant's own declarant admits that registering a new voter on Election Day takes just 5-10 minutes, WNV-A732—a short time for voters who otherwise would be unable to vote at all. Further, as one elections administrator testified, HB 176 "doesn't get rid of" any long lines, but "just moves them" to the earlier registration deadline. WNV-A405; WNV-A508; *see also generally* WNV-A47 (finding HB 176 does not eliminate any Election Day burden, but "just moves the burden" to the earlier deadline). Simply put, "the data indicate that [EDR] is not associated with long wait times in Montana." WNV-A667.

Regardless, the record also is clear that long lines at the polls are not a problem in Montana. 100 percent of voters in 2020 and 97.7 percent in 2016 reported waiting in line on Election Day for less than 30 minutes. WNV-A666.

Just ten percent of all in-person Montana voters—and only one percent of all Montana voters—waited for more than ten minutes to vote in 2020. WNV-A625-26. These wait times are far less than the national average. WNV-A626. During the past decade, even as EDR has become increasingly popular, wait times at the polls in Montana have *decreased*. WNV-A626.

If HB 176 is truly designed to reduce long lines that "prevent[] Tribal voters from registering and voting," Def's Br. 44, the law is completely self-defeating as to its stated purpose. The uncontested record demonstrates that repealing EDR increases voter costs and reduces turnout for Native American voters. Indeed, even if there are isolated instances of long lines in Montana, "extremely unusual circumstances would need to hold in order for HB 176 to cause additional turnout, let alone for it to cause enough additional turnout to fully offset or exceed the negative effect on turnout of removing EDR." WNV-A624. In this way, even if long lines at the polls were a problem, and even if HB 176 could reduce those lines—two assumptions that are demonstrably untrue—the law still would not be tailored to meet those goals. As noted *supra*, there are many ways to reduce wait times at polls that would benefit Native American voters, are not opposed by tribal communities, and do not burden them as HB 176 does.

Ultimately, HB 176 cannot survive any balancing test because Appellant has failed to offer *any evidence* that it serves a legitimate purpose.

E. The District Court Did Not Abuse its Discretion in Finding Appellees Made a Prima Facie Showing that HB 176 Violates Equal Protection.

In her opening brief, Appellant does not contest the District Court's holding that "[Appellees] have made a prima facie showing that HB 176 . . . unconstitutionally burden[s] [Appellees'] right to equal protection of the laws by treating similarly situated groups unequally." WNV-A47. Appellant argues instead regarding another law challenged by different plaintiffs—SB 169—that a facially neutral law cannot violate equal protection if it was not passed with discriminatory intent. *See* Def's Br. 31.

To the extent this Court still considers this argument—which has been waived for HB 176—this Court's precedent says precisely the opposite. Under Montana law, a facially neutral classification may still constitute an equal protection violation where "in reality [it] constitut[es] a device designed to impose different burdens on different classes of persons." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 154, 104 P.3d 445, 449 (internal citations omitted); *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 10, 420 P.3d 528, 535; WNV-A47. When evaluating whether a facially neutral statute violates equal protection, this Court has established a two-part test. First, courts "identify the classes involved and determine whether they are similarly situated" despite differing burdens. *Snetsinger*, ¶ 16 (internal citation omitted). Second,

courts "determine the appropriate level of scrutiny" to apply to the challenged law. *Id.* ¶ 17.

As to this first step of the *Snetsinger* inquiry, Native American voters and non-Native American voters are otherwise similarly situated, but HB 176 levies disproportionate burdens on the former. Native Americans both face more severe voter costs than non-Native voters, and use EDR at higher rates as compared to other Montanans. WNV-A248. Appellant has not contested any part of this detailed factual record regarding the disproportionate burden HB 176 has on Native American voters in Montana—not in her opening brief, and not at any point in this entire litigation.

At the second step of the *Snetsinger* analysis, this Court makes clear that even for a facially neutral law, "[s]trict scrutiny applies if a suspect class or fundamental right is affected." *Snetsinger*, ¶ 17. HB 176 burdens the fundamental right to vote of Appellees and their members. Given that Appellant cannot justify HB 176 under strict scrutiny, *see supra*, HB 176 violates equal protection.

II. The District Court Did Not Abuse its Discretion in Finding that Appellees Would Suffer Irreparable Harm Absent an Injunction

As the District Court found, Appellees have established a prima facie case of irreparable harm. "For the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." *Driscoll*, ¶ 15. "A restriction on the fundamental right to vote therefore constitutes irreparable injury." *Obama*

for Am., 697 F.3d at 436 (citation omitted); *see also Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016); *League of Women Voters of N.C.*, 769 F.3d at 247. The right to vote and to equal protection are fundamental constitutional rights that will be violated if the preliminary injunction is vacated. A preliminary injunction is further necessary to address the current and ongoing harm affecting Organizational Appellees. They need to plan for the upcoming general election, and the District Court found "that their operations have already been impacted by HB 176" and that the law will force those organizations "to spend additional resources to hire organizers earlier in the election cycle or mobilize turnout." WNV-A26. Those resources will need to be mobilized in the upcoming months.

Appellant argues that the District Court failed to make Appellees prove irreparable harm, given that elections in 2021 "occurred . . . without issue." Def's Br. 14. This is factually incorrect. The District Court found that otherwise qualified Montana voters were disenfranchised in 2021 solely because they were unable to register on Election Day. WNV-A10-11; *see* WNV-A701 (noting that in even in the low-turnout 2021 elections, HB 176 "led to 17 qualified voters being unable to cast ballots in Gallatin County"); WNV-A709 ("Despite extensive public outreach about the lack of [EDR], Missoula County had to turn away eight otherwise eligible voters" who were unregistered on Election Day). The District

Court further found that thousands of people have used EDR in each general election since it has been in place. WNV-A9.

Appellant fails to produce any evidence supporting the claim that the 2021 elections occurred "without issue" for Native Americans. She provides no analysis of how Native Americans fared during these elections, and instead simply notes how many total votes were cast in 2021 elections. Yet raw turnout numbers provide no actual evidence about the disenfranchising effects of HB 176,[6] nor do they provide a rubric by which to evaluate which groups, if any, felt those effects more heavily. Conversely, Appellees have provided uncontroverted evidence that HB 176 disproportionately burdens the fundamental voting rights of Native Americans because Native Americans both face higher voter costs in general and use EDR at higher rates. *See* WNV-A11. This is precisely the sort of record this Court confronted in *Driscoll*, when it upheld a finding of irreparable injury for Native Americans in Montana. *See Driscoll*, ¶ 24; *see also generally Obama for Am.*, 697 F.3d at 431.

Appellant erroneously argues that Appellees' delay undermines their case of irreparable harm. This is wrong as both a factual and legal matter. Factually

[6] *See, e.g.*, Alex Samuels, *Why Georgia's Turnout Numbers Don't Tell Us Enough About the Effect of Restrictive Voting Laws*, FiveThirtyEight, (June 6, 2022) https://fivethirtyeight.com/features/why-high-turnout-in-georgia-doesnt-mean-voting-restrictions-havent-had-an-effect/./.

speaking, Appellees did not delay in filing their preliminary injunction. The preliminary injunction schedule was a result of a stipulated agreement between the parties, and was structured to occur after discovery had been served but prior to the first statewide elections taking place with HB 176 in effect. WNV-A403-05. The initial discovery was critical to Appellees' case because the requested voter files and associated data were necessary for compiling expert witness reports. WNV-A404. In turn, those expert reports provided the underpinnings for Appellees' entire preliminary injunction motion. After Appellant's delay in discovery, she finally produced the requested materials and Appellees expeditiously produced expert reports supporting their Motion for Preliminary Injunction and entered into the stipulated schedule with the State. WNV-A405. The District Court had these facts before it and found that Appellees had not delayed in filing their preliminary injunction motion. WNV-A56-57.

As a matter of law, the sort of delay which courts have found to be prohibitive of preliminary relief are situations with much longer delays or in which the challenged activity has already ripened past court intervention. In the elections-related cases Appellant cites, the plaintiffs sought preliminary injunctions only after many years, and thus multiple statewide elections, had already elapsed. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018); *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976). That is completely different to the situation here, where

no statewide election had occurred. Appellant also cites *Boyer v. Karagacin* (1978), 178 Mont. 26, 34, 582 P.2d 1173, 1178, a case in which "a period of over one and one-half years" elapsing did not cause the Court to deny preliminary relief. Appellant cherry-picks two cases in which courts denied preliminary relief based upon relatively short periods of delay, but ignores cases in which injunctive relief was sought and granted months after the initial filing of a Complaint. *See, e.g.*, *Ind. State Conf. of Nat'l Ass'n for Advancement of Colored People v. Lawson*, 326 F. Supp. 3d 646, 655 (S.D. Ind. 2018), *aff'd sub nom. Common Cause Ind. v. Lawson*, 937 F.3d 944 (7th Cir. 2019); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 710 (M.D. Tenn. 2019). Moreover, even in the federal cases Appellant cites—where a different test for granting preliminary relief governs—the courts still do not establish a *per se* legal bar if a particular amount of time has elapsed from the filing of the complaint until the movant sought preliminary relief. Rather, the time lapse is simply one consideration in assessing the harm to the moving party. Similarly, not a single Montana case suggests the sort of prohibition Appellant urges. The District Court properly found that filing a preliminary injunction with the commencement of an action was not required by Montana law. WNV-A56-57.

III. The Public Interest and Balance of Equities Clearly Favor Appellees

The balance of equities and public interest clearly militate in favor of affirming the preliminary injunction. The injunction serves the public interest because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted). Even if this Court credited Appellant's arguments regarding burdens on election administrators—which it should not—it is axiomatic that administrative burdens cannot trump constitutional rights. *See, e.g.*, *Fish*, 840 F.3d at 755 ("There is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by [the Secretary of State's] office and other state and local offices involved in elections."); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2012) (finding that administrative, time, and financial burdens on the State are "minor when balanced against the right to vote, a right that is essential to an effective democracy"). The balance of the equities leans heavily in Appellees' favor.

Further, Appellant failed to contest the equities or public interest in their briefing before the District Court, and has therefore waived the defense. *See Danelson v. Robinson*, 2003 MT 271, ¶ 17, 317 Mont. 462, 466, 77 P.3d 1010, 1012 ("Because [party] did not make this argument below, they have waived the right to bring this argument on appeal."). It was not error for the District Court to

refuse to consider a defense that had been waived by the party. *See George v. Bowler*, 2015 MT 209, ¶ 14, 380 Mont. 155, 158, 354 P.3d 585, 588 ("[W]e will not place the District Court in error for an action to which the appealing party acquiesced"). The District Court's practice is consistent with how preliminary injunctions have been considered in other cases where the equities and public interest are not contested. *See, e.g.*, *Driscoll*, ¶ 23 (finding that a preliminary injunction had been properly ordered to BIPA without a discussion of public interest or the equities). Regardless, Appellant barely argues the point here, only stating in conclusory fashion that the public has a "significant" interest "in its election statutes [] and efficient election administration." Yet "the public has no interest in the enforcement of what is very likely an unconstitutional statute." *Odebrecht Constr., Inc. v. Sec., Fla. Dep't of Transp.*, 715 F.3d 1268, 1290 (11th Cir. 2013).

Finally, Appellees continue to agree with the District Court that the status quo—the "last actual, peaceable, non[-]contested condition which preceded the pending controversy." *Driscoll*, ¶ 14 (internal quotation marks omitted)—is the state of the law prior to the passage of HB 176. Appellant has had notice that Appellees were challenging HB 176 well before the 2021 elections. While some Montanans voted in the 2021 elections, turnout in those off-cycle local elections is paltry compared to statewide elections. The number of votes cast also does not

reflect the number of Montanans who have voted under those conditions. High-propensity voters generally turn out across all local elections, and so the number of actual voters in the 2021 elections is more likely around a third of the number of votes cast. High-propensity voters, too, have no need to rely on EDR, so the voters who voted in 2021 do not reflect the population who are impacted by HB 176.

Even if this Court disagrees with Appellees on what constitutes the "status quo" in this litigation, this issue should not be dispositive in deciding this appeal. "It must not be thought . . . that there is any particular magic in the phrase 'status quo.' The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Golden Gate Restaurant Ass'n v. City & Cnty. of S.F.*, 512 F.3d 1112, 1116 (9th Cir. 2008); *see also Tanner Motor Livery, Limited v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963). Given that preventing irreparable injury is the touchstone of a preliminary injunction, "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury." *Golden Gate Restaurant Ass'n*, 512 F.3d at 1116. As the District Court found, and as Appellees have argued *supra*, the implementation of HB 176 is already causing them irreparable injury by burdening their fundamental rights, and the repeal of EDR already disenfranchised voters in the few low-turnout elections that have occurred with HB 176 in place. WNV-A10-11. A preliminary

injunction is necessary to prevent this ongoing harm to Appellees and their members.

IV. Appellees Have Standing

Appellant relegates her full discussion of Appellees' standing to a single conclusory footnote, where she claims without authority that Appellees lack standing because they "are organizations, not voters." Def's Br. 24 n.7. This Court should not consider this argument, as it was summarily raised in a footnote. *See In re Juarez*, 836 F. App'x 557, 561 n.1 (9th Cir. 2020) (finding appellants had waived an argument they "relegated to a conclusory footnote").

Appellant's cursory argument is also unfounded. Under Montana law, "[a]n organization may assert standing either as an entity or by the associational standing of its members. As an entity, an organization may 'file suit on its own behalf to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the [organization] itself may enjoy.'" *New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.*, 2014 MT 69, ¶ 27, 374 Mont. 229, 236, 328 P.3d 586, 593. The District Court correctly found that Appellees have organizational standing because HB 176 has made and will continue to make Organizational Appellees "spend additional resources" to counter the law's disenfranchising effects. WNV-A26 (internal quotation marks omitted); WNV-A302-03. The District Court also properly found that Appellee Tribes have *parens*

patriae standing because they have "a sufficient quasi-sovereign interest . . . of protecting the constitutional rights of their members which relates to their health and well-being." WNV-A32; *see generally Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607-608 (1982). Appellant does not contest Appellee Tribes' *parens patriae* standing and did not do so at the District Court. *See* WNV-A32.

CONCLUSION

Appellees respectfully request that the Court affirm the District Court's grant of the preliminary injunction.

DATED THIS 15th day of June, 2022.

Respectfully submitted,

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material, and is 9,980 words, which is under the 10,000-word page limit specified in Rule 11(4)(a).

/s/Alex Rate

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